U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 14 April 2006

BALCA Case No.: 2005-INA-00094
ETA Case No.: 2004-NY-02504847

In the Matter of:

MATHEW LEFKOWITZ AND FRED TAN,
Employer,

on behalf of

INGRID LORENA OTAROLA,
Alien.

Appearance: Lourdes P. Gomez, Esquire
New York, New York
For the Employer and the Alien

Certifying Officer: Dolores DeHaan
New York, New York

Before: **Burke, Chapman, and Vittone**[1]
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of alien labor certification for the position of Household Worker.[2] The CO denied the application and Employer requested review pursuant to 20 C.F.R. § 656.26.

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[1] Associate Chief Administrative Law Judge Thomas M. Burke did not participate in this matter.

[2] Permanent alien labor certification is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). This application was filed prior to the effective date of the "PERM" regulations. *See* 69 Fed. Reg. 77326 (Dec. 27, 2004). Accordingly, the regulatory citations in this decision are to the 2004 edition of the Code of Federal Regulations published by the

STATEMENT OF THE CASE

On April 26, 2001, Employer, Mathew Lefkowitz and Fred Tan, filed an application for labor certification to enable the Alien, Ingrid Lorena Otarola, to fill the position of Household Worker. (AF 67). Three months of experience in the job offered were required. The job duties were described as follows:

> Cleaning, laundry, ironing, cooking, preparing meals, setting and clearing table for every meal, marketing, washing dishes, vacuuming, changing linens, polishing, dusting, assisting in serving guest, and babysitting when needed.

By letter dated December 23, 2003, Employer notified the New York Department of Labor of its recruitment results. (AF 44). According to Employer, one applicant advised him that she was an illegal and the second applicant had been employed for several years as a babysitter, with very little housekeeping involved. Accordingly, she was found to be not qualified for the job. Employer further asserted that the second applicant had no experience cooking and serving large numbers of people, which was a necessity for the job.

On April 16, 2004, the CO issued a Notice of Findings ("NOF") proposing to deny certification.[3] (AF 35). The CO found that two U.S. applicants were rejected for other than lawful job-related reasons. With regard to the second applicant, the CO noted that she had three years of experience in household/babysitting duties and was rejected because Employer felt that her experience was primarily babysitting with very little housekeeping. The CO questioned why this applicant was rejected since she had three years of experience in housekeeping and babysitting duties. The CO also questioned how this applicant was contacted, since this information was not specified. Employer was directed to provide proof of contact. If the applicant was rejected based on an interview, Employer was directed to document the job-related

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Government Printing Office on behalf of the Office of the Federal Register, National Archives and Record Administration, 20 C.F.R. Part 656 (Revised as of Apr. 1, 2004), unless otherwise noted. We base our decision on the record upon which the CO denied certification and Employer's request for review, as contained in the appeal file ("AF") and any written arguments. 20 C.F.R. § 656.27(c).

[3] Those issues which were successfully rebutted will not be detailed herein.

reasons and if the applicant was rejected on the basis of her resume, then Employer needed to show why she was so rejected.

Employer submitted rebuttal dated May 20, 2004. (AF 16). Employer provided telephone records showing telephone calls to the two applicants, and a notarized letter attesting to Employer's conversation with one of the second applicant's two references. The reference in question was the applicant's employer from 1999 to 2001, and she advised Employer that the applicant's job duties were primarily babysitting. Employer stated that he did not have a record of his telephone call with that employer. The applicant was interviewed in person and it was determined that she did not have three years of experience in household/babysitting, as most of her experience consisted of babysitting.

A Final Determination was issued on June 22, 2004. (AF 14). The CO accepted the rejection of the applicant who had no authorization to work, but found that Employer had failed to provide a lawful, job-related reason for rejecting the second applicant. The CO noted that Employer stated that he did not have a record of the telephone call with the applicant's reference and questioned why Employer did not request a letter from this former employer describing the applicant's job duties. The CO questioned why Employer did not contact the applicant's most recent employer, as the applicant's resume listed a second employer whose telephone number was also provided and under whose employment the applicant performed qualifying work.

In the Final Determination, the CO found that Employer had not listed in the job description the necessity of having experience cooking and serving large numbers of people in the job description, but instead required "cooking and…assisting in serving guests and babysitting when needed." Employer's stated reason for rejecting this applicant, however, was that she had minimal experience in housekeeping and "no experience cooking and serving large numbers of people." (AF 44). The CO found that the applicant's experience exceeded Employer's minimum requirements and Employer had failed, therefore, to document that she did not meet the minimum experience requirement and was not able, willing, qualified or available for the job.

On July 23, 2004, Employer requested reconsideration. (AF 6). On September 9, 2004, the CO denied Employer's Request for Reconsideration and Employer filed an appeal with the Board of Alien Labor Certification Appeals ("Board") on September 22, 2004. (AF 1, 5). The Board docketed the case on December 21, 2004.

DISCUSSION

In its appeal, Employer contends that the CO raises issues for the first time in the Final Determination, thus failing to give Employer an adequate opportunity to rebut the same. Employer claims that the CO questioned the credibility of Employer, finding Employer untrustworthy without any factual basis; that the request for a letter from the applicant's reference as made in the Final Determination when not raised in the NOF deprived Employer of its rights to due process; that the question raised in the Final Determination regarding Employer's failure to contact the applicant's second reference should have been raised in the NOF and not the Final Determination; and that the issue of a business necessity was raised for the first time in the Final Determination, when the CO noted that the job description did not include the requirement of experience in cooking and serving large numbers of guests. Employer argues further that it engaged in good faith recruitment and that a *bona fide* job opportunity was established.

With regard to the U.S. applicant's qualifications, Employer contends that the description of work, as provided by the applicant with regard to her second employer, wherein she described her housekeeping duties as light housekeeping, was sufficient to indicate that that position did not provide her with the requisite experience. Employer argues that had the CO raised the issue of the employment with this second employer, Employer could have provided this explanation in its rebuttal. Employer contends that "guests," as set forth in the ETA 750A can mean "large numbers of people." Employer argues that it did request a written response from the one employer who was contacted, but she refused the request, as she had just remarried, had a new name, and did not want to be bothered with a letter.[4]

[4] Employer has raised arguments which were not presented before the CO. This Board's review is to be based on the record upon which the denial of labor certification was made, the request for review, and any statement of position or legal briefs. 20 C.F.R. § 656.27(c); *see also* 20 C.F.R. § 656.26(b)(4). Thus, evidence first submitted

In her resume, the U.S. applicant in question listed as her skills babysitting and cleaning, detailing her experience in the latter area as ironing, vacuuming, dusting, changing sheets, cooking, setting tables, washing dishes, doing laundry, etc. Her resume indicates that she performed those duties in two different households from 1999 to 2003. (AF 51). Employer states that it contacted one of the applicant's prior employers and determined that the job duties there did not include sufficient housekeeping and that the applicant's employment with the second employer did not even warrant checking since it listed only light housekeeping.

Employer's arguments ignore reality, which is that the position at issue only required three months of experience. This particular applicant had over three years of the required experience. It is not persuasive evidence of her failure to meet the job requirements to state that here previous work was "light housekeeping" or primarily babysitting. Given the years of experience this applicant had in the job duties required, there can be little doubt that during those years she accumulated the requisite three months of experience. While Employer claims that the applicant's employment with the prior employer it did contact did not meet the minimum requirements for the job—and even assuming, *arguendo*, that this were the case—there is no persuasive evidence that her employment with the second employer listed as a reference, which lasted more than three months and included the job duties this Employer required, did not meet that requirement.

An employer who seeks to hire an alien for a job opening must demonstrate that it has first made a "good faith" effort to fill the position with a U.S. worker. *H.C. LaMarche Ent., Inc.,* 1987-INA-607 (Oct. 27, 1988). Employer has the burden of production and persuasion on the issue of lawful rejection of U.S. workers. *Cathay Carpet Mill, Inc.,* 1987-INA-161 (Dec. 7, 1988) (*en banc*). In the instant case, the U.S. applicant in question had several years of experience in the job offered, yet was rejected by Employer for lack of experience, Employer

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with the request for review will not be considered by the Board. *Capriccio's Restaurant*, 1990-INA-480 (Jan. 7, 1992). Furthermore, where an argument made after the Final Determination is tantamount to an untimely attempt to rebut the NOF, the Board will not consider that argument. *Huron Aviation*, 1988-INA-431 (July 27, 1989).

claiming that her experience was primarily that of a babysitter. This conclusion is contrary to the information on the applicant's resume.

Employer also argues that this applicant was rejected because she did not have experience cooking for and serving large numbers of people. This requirement, however, was not listed in the ETA 750A. Employer's argument that the requirement that the applicant have experience in serving large numbers of guests is a business necessity issue is inaccurate, as is the argument that requiring experience in serving guests is equivalent to requiring experience serving large numbers of guests. The CO correctly raised this discrepancy as evidence of a lack of good faith recruitment, not as a business necessity issue.

Labor certification is properly denied where the employer rejects a U.S. worker who meets the stated minimum requirements for the job. *Banque Francaise Du Commerce Exterieur*, 1993-INA-44 (Dec. 7, 1993). If an applicant clearly meets the minimum qualifications for the job they are considered qualified. *UPS*, 1990-INA-90 (Mar. 28, 1991). Employer's rejection of this applicant for failure to meet an unstated requirement, that she have experience serving large numbers of people, also renders her rejection an unlawful one. The issue herein was that of a failure to list a job duty until a U.S. applicant who met the qualifications of the job requirements as stated in the ETA 750 was found, not an issue of business necessity. Thus, we disagree with Employer's claim that the CO denied certification based on grounds not stated in the NOF, and that Employer was consequently not placed on proper notice of the deficiency to be rebutted.

In sum, Employer has failed to provide a lawful job-related reason for the rejection of this U.S. applicant. As the NOF gave Employer fair notice of the issue, any alleged errors made by the CO in the Final Determination are not a violation of due process. *S & G Donut Corp. and SIT Donut Corp. d/b/a/ Dunkin Donuts*, 1988-INA-90 & 91 (May 17, 1990) (*en banc*). Labor certification was properly denied and the following order shall issue.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered at the direction of the panel by:

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Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW Suite 400
Washington, DC 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.